

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DEBRA C. EVANS)	
Claimant)	
VS.)	
)	Docket No. 179,663
BOEING MILITARY AIRPLANES)	
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant requested Appeals Board review of Administrative Law Judge Jon L. Frobish's April 28, 1997, Award. The Appeals Board heard oral argument in Wichita, Kansas.

APPEARANCES

Roger A. Riedmiller of Wichita, Kansas, appeared for the claimant. Frederick L. Haag of Wichita, Kansas, appeared for the respondent and its insurance carrier. John C. Nodgaard of Wichita, Kansas, appeared for the Workers Compensation Fund.

RECORD

The Appeals Board has considered the record listed in the Administrative Law Judge's Award.

STIPULATIONS

The Appeals Board has adopted the stipulations listed in the Administrative Law Judge's Award. Additionally, the stipulations should include 14 weeks of temporary total disability benefits at \$299 per week or \$4,186 paid by the respondent during a vocational rehabilitation process.

ISSUES

The original Award was entered in this case on September 19, 1995, by Administrative Law Judge Shannon S. Krysl. The claimant timely appealed that Award to the Appeals Board. The Appeals Board, in an Order dated January 10, 1997, remanded the case to the Administrative Law Judge. The Appeals Board found the record considered by the Administrative Law Judge was incomplete and further found the claimant should be allowed the opportunity to present rebuttal evidence. Upon remand, the case was assigned to Administrative Law Judge Jon L. Frobish because Shannon S. Krysl was no longer an Administrative Law Judge with the Division of Workers Compensation.

The claimant was provided the opportunity to present rebuttal testimony before Administrative Law Judge Frobish on March 10, 1997. The respondent also presented additional evidence through the testimony of a private investigator who videotaped claimant's activities on January 21, 1997. Thereafter, Administrative Law Judge Frobish entered the April 28, 1997, Award which is the subject of this appeal. Administrative Law Judge Frobish's Award simply adopted Administrative Law Judge Krysl's September 19, 1995, Award.

Administrative Law Judge Krysl found claimant had suffered only a scheduled work-related injury to her right upper extremity. Claimant contends she suffered additional work-related injuries to her neck, shoulder, and left upper extremity. Claimant argues those injuries are general body injuries which entitle her to a work disability as set forth in K.S.A. 1992 Supp. 44-510e. Claimant also contends she is entitled to vocational rehabilitation benefits as provided for in K.S.A. 1992 Supp. 44-510g.

Respondent, on the other hand, contends that Administrative Law Judge Frobish's April 28, 1997, Award should be affirmed. Respondent has not contested, during the exhaustive litigation of this case, the fact that claimant's repetitive work activities caused carpal tunnel syndrome of her right wrist. However, respondent denies that claimant's alleged neck, shoulder, and left carpal tunnel syndrome are work related, but if they are found to be work related then respondent contends those injuries have resolved with no residual permanent functional impairment. In regard to claimant's claim for vocational rehabilitation benefits, respondent argues claimant is not eligible because the record proves claimant is currently gainfully employed in the operation of a day care center.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

What is the nature of claimant's disability?

On July 1, 1992, claimant worked for the respondent as a lead modification mechanic. Claimant felt a snap in her neck as she shot a rivet in a bracket of a floor beam in the cargo portion of a 747 airplane. The area in which claimant was working was not easily accessible and claimant had to tilt her head in an awkward position in order to shoot the rivet.

Claimant testified she did not have immediate pain in her neck but decided to sit down for a minute because she felt funny. At that time, claimant testified she lost her forward vision. However, claimant's vision was restored after she rested and after she took her lunch break.

The next day claimant awoke with a headache but was able to work that day by taking some Tylenol. However, claimant testified she rested over the long 4th of July weekend and still had headaches and pain when she returned to work. Finally, on July 6, 1992, claimant went to Boeing Central Medical for the pain and discomfort in her neck.

Boeing Central Medical referred claimant to orthopedic surgeon Dr. Paul Lesko. Dr. Lesko first saw claimant on July 7, 1992, and took her off work. Dr. Lesko, because claimant had lost vision on July 1, 1992, referred claimant to neurologist Mark A. Mandelbaum, M.D.

Dr. Mandelbaum saw claimant on July 17, 1992. After taking a history from the claimant and conducting a physical examination, Dr. Mandelbaum had claimant undergo diagnostic testing. Claimant had an MRI examination, electromyography (EMG), nerve conduction test (NCT), and a transcranial Doppler study. The MRI, EMG, and Doppler study were negative. However, the NCT showed right carpal tunnel syndrome. Dr. Mandelbaum's diagnosis was probable cervical strain and right carpal tunnel syndrome. Dr. Mandelbaum testified he only performed the NCT on the right because he only found positive clinical findings on the right. Claimant was returned to Dr. Lesko for further treatment.

Dr. Lesko returned claimant to light work on August 2, 1992, prescribed wrist splints, anti-inflammatory medication, and physical therapy. After claimant expressed her dissatisfaction for Dr. Lesko as the treating physician, the respondent referred claimant to Michael P. Estivo, D.O., an orthopedic surgeon, for further evaluation and treatment.

Dr. Estivo saw claimant on September 29, 1992. He initiated a regimen of conservative treatment that included physical therapy, anti-inflammatory medication and wrists splints. Claimant's right wrist did not respond to the conservative treatment and Dr. Estivo took claimant off work on October 30, 1992. Then on November 6, 1992, Dr. Estivo performed a decompression of the median nerve of claimant's right wrist. During the times claimant was being treated by Dr. Estivo for her right carpal tunnel condition, she also complained to Dr. Estivo of continuing cervical and shoulder symptoms.

On January 5, 1993, Dr. Estivo released claimant from his care to return as necessary. The doctor found claimant had no permanent functional impairment of the cervical or right trapezial areas. He assessed her right upper extremity an 8 percent permanent partial impairment rating as a result of the right carpal tunnel injury. During that visit, Dr. Estivo's medical note indicated, for the first time, that claimant on occasion had discomfort also in her left wrist. He found equivocal positive Tinel's and Phalen's on the left.

Although claimant was released from Dr. Estivo's treatment, she did return for evaluation and treatment on five other occasions following the January 5, 1993, visit. The

last time Dr. Estivo saw claimant was on August 24, 1993. During claimant's February 9, 1993, visit, Dr. Estivo found claimant asymptomatic and concluded her cervical and trapezial strain was resolved. The doctor noted that claimant had excellent healing and her symptoms were resolved from the right carpal tunnel release. Dr. Estivo testified, that while he treated the claimant, he never diagnosed left carpal tunnel syndrome. Also, Dr. Estivo testified that claimant's cervical and trapezial strain diagnosis was based on her subjective complaints with no objective findings.

Dr. Estivo restricted claimant, following his treatment, to the light work category which included lifting limited to 20 pounds occasionally, 13 pounds frequently, no riveting, and no overhead or above shoulder level work more than two thirds of the day. Claimant returned in February 1993 to the respondent with those work restrictions and respondent could not accommodate the restrictions.

Administrative Law Judge Krysl ordered claimant to be evaluated and, if necessary, treated by Philip R. Mills, M.D., board-certified in physical medicine and rehabilitation. Dr. Mills first saw claimant on March 2, 1994, some 16 months after claimant last worked for the respondent on October 30, 1992. Dr. Mills reviewed previous medical treatment records, conducted a physical examination of claimant, and had claimant undergo a NCT test. Dr. Mills diagnosed claimant with bilateral carpal tunnel syndrome and cervical strain with fibromyalgia. He placed claimant in a vigorous physical training program, prescribed anti-inflammatory medication, and had claimant use wrist splints at night.

Dr. Mills saw claimant on five separate occasions. On August 1, 1994, Dr. Mills believed claimant had obtained maximum medical improvement and released her from his care. In accordance with the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), he found claimant's bilateral carpal tunnel syndrome resulted in a 12 percent whole body functional impairment and claimant's cervical fibromyalgia resulted in a 1 percent permanent functional impairment. The doctor also restricted claimant to avoid repetitive wrist flexion and extension; prolonged crimping; repetitive prolonged overhead work; repetitive reaching; vibratory tools; and cold environments. Dr. Mills testified if claimant was not diagnosed with left carpal tunnel syndrome after she worked for the respondent, then that condition could have developed as a result of later activities.

On May 2, 1995, and June 29, 1995, claimant testified she had not been employed since her last day she worked for the respondent on October 30, 1992. Furthermore, claimant was asked what her current activities had been since she last worked for the respondent. Claimant replied she had done voluntary work for the Sedgwick County Republican Party as treasurer. She also testified she spent time with her children. When asked what income she had, claimant replied, "My husband's."

The respondent, through the testimony of a private investigator, videotaped claimant's activities on June 7, 1995, June 29, 1995, and June 30, 1995, and those videotapes were admitted into evidence. Administrative Law Judge Krysl concluded, after viewing the videotapes, that claimant was actively employed running a day care center out of her home. Claimant, however, testified at her regular hearing that she had not been

employed since she had last worked for the respondent. Administrative Law Judge Krysl concluded that claimant was untruthful during her regular hearing testimony.

As previously noted, one of the reasons the Appeals Board remanded the initial award to the Administrative Law Judge was to give the claimant an opportunity to present rebuttal evidence in response to the videotapes. On March 10, 1997, claimant testified before Administrative Law Judge Jon L. Frobish in an effort to rebut the videotape evidence of her activities on June 7, 29, and 30, 1995. During that testimony, claimant admitted she was babysitting children for some friends on June 7, 1995. She also admitted she was babysitting on June 29 and June 30, but testified she was caring for those children because a friend who had a day care center was on maternity leave. Claimant testified she had been babysitting children since March of 1994. Also, claimant testified she was presently operating a licensed day care center out of her home.

Claimant took the position that the reason she originally testified she had not been employed or earned income since she worked for the respondent was because she was self-employed and was, in fact, not making any money from the babysitting business. Claimant and her husband's income tax returns for 1994 and 1995 were admitted into evidence which showed claimant had in 1994 gross income of \$13,850 from the babysitting business. However, after business expenses which included depreciation, the business did not show a profit. The 1995 tax return showed gross income of \$19,642 and profit after business expenses of \$1,282. Claimant testified she knew her ability to earn wages was an issue in her workers compensation case.

At the regular hearing held before Administrative Law Judge Krysl on May 2, 1995, claimant testified her hands, neck, and shoulder injuries remained symptomatic and she had problems lifting even a gallon of milk, vacuuming, turning her head to drive, and holding onto the steering column while driving. Nevertheless, the videotape of her activities showed claimant lifting children and appearing to have full range of motion of the cervical spine.

During claimant's rebuttal testimony, claimant said although she did not show it, she was in pain while she was performing the babysitting activities as shown on the videotape. Claimant indicated she did not show the pain because she had gotten used to it over the years since her injury. Furthermore, claimant testified none of the activities she performed on the videotape were outside Dr. Mills's restrictions. Dr. Mills had not placed any lifting restrictions on claimant's activities.

Both Administrative Law Judge Krysl and Administrative Law Judge Frobish had the opportunity to observe the claimant testify in person. They, therefore, had the opportunity to judge her demeanor and assess her credibility. In weighing the evidence, the Appeals Board finds some deference should be given to the Administrative Law Judges' conclusions in this case because they saw the claimant testify in person.

The Appeals Board, however, has also had the opportunity to observe the videotape of claimant performing her babysitting activities. The Appeals Board finds claimant's explanation that she did not disclose she was engaged in a babysitting business because

she was not making a profit is not reasonable or logical. Claimant had no problem explaining her activities working at home and her volunteer work for the Republican Party when she was asked what activities she had done since working for the respondent. However, claimant failed to disclose during the regular hearing testimony that she was actively engaging in a babysitting business since as early as March of 1994.

The answer to the question of whether claimant suffered a general body disability or a scheduled injury is primarily contingent on claimant's truthfulness in regard to her subjective complaints. The respondent has always accepted the responsibility for claimant's right carpal tunnel syndrome injury and any resulting permanent functional impairment. However, respondent does not accept responsibility for claimant's cervical and trapezial sprain and her alleged left carpal tunnel syndrome injury.

Claimant was not diagnosed with left carpal tunnel syndrome until she was examined by Dr. Mills some 16 months following her last day worked for respondent. On February 9, 1993, claimant was examined by Dr. Estivo and was asymptomatic. Dr. Estivo, at that time, released claimant indicating that her cervical and trapezial sprain was resolved and also her symptoms as result of a right wrist release were resolved. Dr. Estivo testified his diagnosis of a cervical and trapezial sprain was based on claimant's subjective complaints as there were no objective findings. Dr. Mills's diagnosis of cervical fibromyalgia also was based on claimant's subjective complaints.

The Appeals Board finds the medical opinions of orthopedic surgeon Dr. Estivo and neurologist Dr. Mandelbaum who contemporaneously treated claimant for her work-related injuries should be given more weight than physiatrist Dr. Mills who treated claimant some 16 months after her last day worked for the respondent. Also, the Appeals Board finds the record as a whole has established that claimant has not been truthful and, therefore, it is questionable whether she continues to have symptoms in her cervical and shoulder area. The Appeals Board also finds, that since claimant's left carpal tunnel syndrome was not diagnosed until some 16 months after she last worked for the respondent, the more plausible cause for that condition is claimant's activities since she last worked for the respondent.

The Appeals Board concludes claimant's request for a general body disability which would entitle her to a work disability pursuant to K.S.A. 1992 Supp. 44-510e is denied. The Appeals Board agrees with the Administrative Law Judge's finding that claimant suffered permanent impairment to her right upper extremity and she is entitled only to permanent partial disability benefits as provided for in the schedule of injuries found at K.S.A. 1992 Supp. 44-510d. The Appeals Board further finds the appropriate date of claimant's date of accident is October 30, 1992, her last day worked for the respondent instead of February 9, 1993, as found by Administrative Law Judge Krysl. See Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994). The Appeals Board also concludes claimant suffered a cervical and shoulder sprain while working for the respondent on July 1, 1992, but such injury resolved without any permanent impairment. The respondent is responsible for the medical treatment for the cervical and shoulder injury. The left carpal tunnel syndrome condition is found to be not work related and all workers compensation benefits are denied in reference to that condition.

Furthermore, the Appeals Board finds Dr. Estivo's 8 percent permanent functional impairment rating of claimant's right upper extremity is the most credible medical opinion and is therefore adopted by the Appeals Board. The Appeals Board finds the schedule provides for 210 weeks for loss of an arm instead of the 225 weeks used to compute Administrative Law Judge Krysl's Award. See K.S.A. 1992 Supp. 44-510d(a)(13).

**Is claimant entitled to vocational rehabilitation
benefits pursuant to K.S.A. 1992 Supp. 44-510g?**

The respondent paid claimant 14 weeks of temporary total disability benefits during a vocational rehabilitation process. However, the record does not contain any explanation of what vocational rehabilitation process was provided claimant during the 14 weeks she was paid temporary total disability benefits. The process was apparently not completed because the Administrative Law Judge found claimant had not met maximum medical improvement.

The claimant contends she is eligible for additional vocational rehabilitation benefits as provided in K.S.A. 1992 Supp. 44-510g. Because claimant was off work for 90 days or more and has not returned to comparable wage employment, the Appeals Board finds respondent should provide claimant with a vocational rehabilitation assessment in accordance with the provisions of K.S.A. 1992 Supp. 44-510g(e)(1). After the assessment, all necessary hearings in regard to whether claimant is entitled to further vocational rehabilitation benefits should be held before the Administrative Law Judge as provided in K.S.A. 1992 Supp. 44-510g.

Claimant also contends the 14 weeks of temporary total disability benefits paid during the vocational rehabilitation process should not be deducted from the permanent partial general disability weeks before applying the percentage of permanent partial disability to those weeks in computing the Award. The Appeals Board agrees with the claimant's arguments. See K.S.A. 1992 Supp. 44-510g(g).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated April 28, 1997, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Debra C. Evans, and against the respondent, Boeing Military Airplanes, and its insurance carrier, Aetna Casualty & Surety Company, and the Kansas Workers Compensation Fund for an accidental injury that occurred on October 30, 1992, and based upon an average weekly wage of \$1,041.81.

Claimant is entitled to 55.4281 weeks of temporary total disability compensation at the rate of \$299 per week or \$16,573, followed by 12.37 weeks of permanent partial disability

compensation at the rate of \$299 per week or \$3,698.63 for a 8% permanent partial disability of the right upper extremity, making a total award of \$20,271.63, which is all due and owing and is ordered paid in one lump sum less any amounts previously paid.

Respondent is ordered to provide claimant with a vocational rehabilitation assessment in accordance with K.S.A. 1992 Supp. 44-510g(e)(1).

Claimant is awarded 14 weeks of temporary total disability compensation at the rate of \$299 per week or \$4,186 for the time claimant was involved in a vocational rehabilitation assessment.

Pursuant to the stipulations of the parties, the Workers Compensation Fund is liable for 50% of the award.

All remaining orders of the Administrative Law Judge contained in the Award are adopted by the Appeals Board as if specifically set forth in this order.

IT IS SO ORDERED.

Dated this ____ day of June 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Wichita, KS
Frederick L. Haag, Wichita, KS
John C. Nodgaard, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director